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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 421

E. G. BRADHAM AND RUBY BRADHAM, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court wrote no opinion. The opinion of the court of appeals (R. 203-207) is reported at 168 F. 2d 905.

JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on July 19, 1948 (R. 208). An order of Mr. Justice Rutledge, extending the time within which to file a petition for a writ of certiorari to November 16, 1948, was entered on October 12, 1948 (R. 210). The petition for a writ

of certiorari was filed on November 15, 1948. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the findings of the two courts below that the property described in a deed of unallotted Indian land was not bounded by the Red River in Oklahoma with the result that the Indians rather than the purchasers were entitled to subsequent accretion, were clearly erroneous, and if so,

2. Whether a purchaser of land at a tax sale must be denied reformation of the deed by which the former owner acquired the property for want of privity.

STATEMENT

The United States, acting for itself and for the Choctaw and Chickasaw Tribes of Indians, instituted this proceeding on November 25, 1946, to quiet title to, and for possession of, approximately 800 acres of land which have accreted in and to a certain section in McCurtain County, Oklahoma, extending south to the Oklahoma-Texas border, known as "New Island" (R. 3-12, 59).

In 1842, the United States granted all lands north of the Red River in what is now McCurtain County, Oklahoma, to the Choctaw Nation and in 1866, by treaty, the Chickasaw Nation was granted lands in the same area (R. 26, 109-110). In 1897, the General Land Office surveyed the Indian country and platted the meander line of the Red River

as it then ran as a part of the survey of the lands north of the river. At that time, the Red River flowed in a loop within Section 32 from south to north and again south so that Section 32 was only a fractional section north of the river and most of the lots therein were also fractional. (R. 13, 26, 163, 164.)

In 1912, the Secretary of the Interior, through the Commissioner of the Five Civilized Tribes, published a notice offering for sale at public auction, among other tracts of unallotted Indian land, Tract No. 1107 in Section 32 (R. 157-159). This tract was shown on a plat and was described in terms of lot numbers and acreages totalling 134.45 acres (R. 66, 163, 169). The tract, and accordingly most of the lots therein, was bounded on the east and south by the meander line of the north bank of the Red River.

The minimum bid which would be received for this tract was $739.48 (R. 65, 159). The published notice stated that all the unallotted lands in McCurtain County were to be sold, that no bid for any fractional part or subdivision of any tract would be considered, that "25 per cent of the amount bid must be paid at the time of sale, balance with 6 per cent interest from date of sale as follows: 25 per cent in one year and 50 per cent in two years from date of sale." It further provided that all bids would be accepted subject to the approval of the Secretary of the Interior and immediately after

such approval a certificate of purchase would be issued after which the purchaser would be entitled to immediate possession (R. 158).

At this sale on December 23, 1912, Nicholas A. Shaw and Robert Young bid the minimum price of $739.48 for Tract 1107 and paid $184.90 as the 25 per cent required by the notice of sale (R. 32, 160).

Thereafter, on January 19, 1913, Shaw and Young wrote a letter to the Commissioner of the Five Civilized Tribes, as follows (R. 165-166):

> At the recent sale of lands at Idabel Okla Tracts No. 1105 and 1107 were bought by Young and Shaw. We find that each of these tracts have caved into the river considerably since the original survey was made. Tract No. 1105 having caved something like 40 acres 1107 has caved almost as much. We can verify this statement by the affidavit of county surveyor. If you will have this land surveyed we will pay all cost if you dept. does not a we represent it to be. Please advise what are the necessary steps to take having this adjusted. [sic]

After their letter, Shaw and Young paid interest on the deferred balance of the purchase price in December 1913, 1914, 1915 and 1917, but they did not pay the additional installments required by the notice of the auction (R. 158, 160).[1] However, in

[1] It appears from the files of the Superintendent of the Five Civilized Tribes that one Gardenhire made a survey on Tract 1107 some time prior to March 8, 1914 (R. 32-33, 68, 167). It

1918, they paid the balance of a new purchase price of $592.13 and received a deed, approved by the Secretary of the Interior, for 107.66 acres instead of the original 134.45 acres (R. 36, 165, 160, 171-173). The deed describes the property as being "that part" of the lots in Tract 1107 which it defines by metes and bounds (R. 171-173). The deed omitted Lot 1. The acreage stated in the deed corresponds substantially with the description (R. 35). The lines of the deed follow neither the meander line of the 1897 survey nor the Gardenhire survey of 1914 (R. 34).

Some time after the survey of 1897, the loop of the Red River began to move gradually south until in 1927 it had reversed itself to become a loop to the south, leaving a large accretion in the form of a peninsula known as "New Island" (R. 27, 186). In 1926, the boundary commissioners appointed by this Court (261 U. S. 341) established the southern bank of the Red River around this peninsula as the Oklahoma-Texas boundary line. In 1927, during a flood, the river made an avulsive cut-off across the northern part of this accreted peninsula leaving the land here involved partly north and partly south of the present channel (R. 28).

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is not known who Gardenhire was or for what purpose the survey was made (R. 68). His notes trace a line on the east of the tract which is west of the meander line of the Government survey of 1897 on the north and east of it toward the southern end (R. 33). His map shows a calculation of 107.66 acres within the tract (R. 168), but his notes show a line embracing considerably less acreage (R. 34, 73, 81).

The land purchased by Shaw and Young was placed on the tax rolls of McCurtain County in 1919 and remained thereon through 1942 (R. 36-37). The annual assessments described the land as it is described in the deed to Shaw and Young and listed it as "Parts Lots 2, 3, 4, 6 and 7 (67.66 acres) Sec. 32-10-27" (R. 36-37). Shaw and Young failed to pay taxes on the property and it was sold for nonpayment of taxes by the county to one George Ashford in 1933 (R. 37, 102). Ashford quitclaimed it to T. E. Derryberry in February 1942 (R. 37, 102). In this instrument, there were added to the description the words: "and all accretions thereunto belonging" (R. 37). Derryberry conveyed it under the latter description on May 29, 1942, to E. G. Bradham and Ruby Bradham, petitioners here, who now claim to own this land (Tract 1107) and all accretions as the successors in title of Shaw and Young (R. 13-22).

At the trial, the United States, to support its claim that the land comprising New Island belonged to the Choctaw and Chickasaw Tribes, relied on the deed of 1918 to Shaw and Young, contending that the metes and bounds description of the area conveyed was clear and unambiguous, that the eastern boundary was not a meander line of the river, that the 1918 sale was a new transaction without relation to the description and terms contained in the notice of public auction of 1912,

and that by the description in the deed of 1918, there remained unconveyed as property of the Indians a strip of land between the east boundary of Tract 1107 and the river to which New Island had accreted.

The Bradhams contended that the original notice of sale based on the 1897 survey and listing the tracts by number, and the Gardenhire survey of 1914 showed that it was the intention of the Government to convey to Shaw and Young a tract of land riparian to the river and that, accordingly, all accretions belong to the owners of that tract. They sought reformation of the deed to effect that result (R. 108).

The district court found as a fact that the eastern boundary in the deed was not a meander line and that, at the time of the completion of the sale to Shaw and Young, there was "a strip of land of indeterminable but recognizable substantial width susceptible of ownership lying south and east of the boundary described in their deed and between that boundary and the river channel" (R. 38), and concluded, therefore, that the New Island accretion was the property of the Choctaw and Chickasaw Tribes. Judgment was entered on September 22, 1947, quieting title in the Indians (R. 43-45). The court of appeals affirmed the judgment, holding that the evidence supported the findings of the trial court (R. 203-207).

ARGUMENT

1. The question as to whether the deed to Shaw and Young conveyed a tract of land bounded on the east and south by the Red River so that lands subsequently formed by a gradual movement away of the river accreted to that tract depends upon whether the description of those boundaries in the deed defined the meander line of the river. That is a question of fact. Both courts below found that the description in the deed did not follow the meander line of the river (R. 33, 207). "Under the well-established rule, this Court accepts the findings in which two courts concur, unless clear error is shown." *Texas & N. O. R. Co.* v. *Ry. Clerks,* 281 U. S. 548, 558; *Radio Corporation* v. *Radio Laboratories,* 293 U. S. 1, 6.

There is no error in the concordant findings of the courts below. The description in the deed is unambiguous. It describes by courses and distances and by acreage, which agrees with the perimeter description, *"that part"* of the lots in the tract originally offered for sale and shown on the map of the United States survey of 1897 (R. 13-14, 172). The lots in the tract originally offered for sale were bounded on the east and south by the Red River (R. 13-14, 55, 163-164). The only boundary of the original tract which is changed in the deed is the boundary on the river side. In the deed, that boundary is moved into the tract away from the river as it was shown on the map accompanying

the notice of sale of the original tract. Since the lots which comprised the original tract were bounded by the river and that boundary is the only one changed in the deed, it follows inescapably that the "part" of them conveyed by the deed was not bounded by the river. That evidence on the face of the deed amply sustains the findings of the two courts below and gives answer to petitioners' assertion (Pet. 11) that there is "no evidence in the record indicating an intention to exclude accreted lands." It is fortified by absence from the calls in the deed of any reference to the river, the river bank, or other topographic feature related to the river. The cases on which petitioners rely to establish a conflict of decisions on this point (Pet. 8-11), holding that a deed may describe a meander line without mentioning the river and that patents to uplands adjoining a nonnavigable river carry title to the middle of the stream, are not apposite to the facts of this case where the river is so evidently excluded by the terms of the deed.

Since there is no ambiguity in the deed, resort to extrinsic evidence to vary its terms is unwarranted. *Jones, et al.* v. *Johnston,* 18 How. 150. But even so, the evidence extrinsic to the deed on which petitioners rely only provides further support for the findings of the two courts below. Petitioners contend that Shaw and Young "bought all of the land embraced in Tract No. 1107 as the same was described in the notice of sale" (Pet.

16), because an executory contract of sale was established when they paid the first installment on their bid on December 23, 1913. Since Tract No. 1107 as described in the notice of sale was riparian property, they reason that the tract finally conveyed in 1918 was also bounded by the river. Petitioners' attempt thus to establish riparian ownership overlooks the evident fact that the sale to Shaw and Young by the deed of 1918 was an adjustment of the original contract at their request so that they would not have to pay for anything but the usable uplands. The line in the deed was clearly for this purpose and not for the purpose of establishing a meander line of the river.

Moreover, unlike the original notice of sale, the deed described the tract by courses and distances without mention of the river instead of by reference to a map showing the river as a boundary and, contrary to the provision in the notice that no fractional part of the tracts advertised would be sold, expressly conveyed fractional parts of the lots in Tract 1107 and omitted Lot 1 entirely. Thus, the terms of the executory contract, if one existed, which carried riparian ownership, were so substantially modified at the purchasers' request in the ultimate conveyance six years later in all matters related to riparian ownership as to point to relinquishment of it rather than to retention of it. By declining to take and pay for more than the usable uplands, Shaw and Young established their unwill-

ingness to take their side of the chance involved in the law of accretion. Contrary to petitioners' assertion (Pet. 14), the court of appeals was correct in ruling under those facts that "the terms of the contract of sale were thus modified and the prior contract was merged in the deed" (R. 207). *Van Ness* v. *City of Washington,* 4 Pet. 232, 284, 285; *McGinley* v. *Martin,* 275 Fed. 267, 269 (C. C. A. 8); *Dawson* v. *Sears,* 188 Okla. 544.

2. Since, as the court below held (R. 207), "the evidence afforded no basis for reformation of the deed", petitioners' discussion of the subject of reformation is irrelevant. In any event, petitioners' assertion (Pet. 7) that the court below held "that a purchaser of a tax title in Oklahoma had no right to maintain an action to establish title to accreted land for the reason, as the court said, there was no privity of estate with these petitioners who hold only under a tax title and the former owner who took title from the government" miscontrues the decision of the court below. It merely held that even if petitioners had established error or mistake in the description of the lands conveyed, which they did not do, they were not entitled to reformation of the 1918 deed because a bill to reform a deed cannot be maintained by persons who are neither parties to the instrument nor claiming any privity. The court was correct in that ruling. *Uhlmann Grain Co.* v. *Fidelity and Deposit Co.,* 116 F. 2d 105 (C. C. A. 7); *Byrne* v. *Smith Nat. Bank,*

1 Ind. Terr. 680, 43 S. W. 957 (C. A. of Ind. Terr.); 45 Am. Jur., sec. 64, p. 623. The title of a purchaser at a tax sale is a virgin title. There is no privity between the former owner of land and one who acquired title thereto through a tax sale. The latter is not derived from but is antagonistic to the former. *Hussman* v. *Durham,* 165 U. S. 144, 147; *Hefner* v. *Northwestern Life Ins. Co.,* 123 U. S. 747, 751; *Taylor* v. *Lawrence,* 176 Okla. 75.

Finally, petitioners' contention (Pet. 19-20) that even if reformation is not allowable that fact could only affect lands accreted to Lot 1 which the deed omitted is without merit. To entitle petitioners to any accreted land the deed would have to be reformed as to all lots on the river side because, as we have shown, it conveyed only fractional parts of all those lots with the result that none of them was riparian.

CONCLUSION

The decision below is correct and presents neither conflict nor question of general importance. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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